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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WILMA PICKETT, Plaintiff and Appellant, v. INDYMAC MORTGAGE SERVICES, Defendant and Respondent.	B282022 (Los Angeles County Super. Ct. No. BC576809)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Affirmed.

Law Offices of Edi M.O. Faal, Edi M.O. Faal and Renée L. Campbell for Plaintiff and Appellant.

Chuck & Tsoong, Stephen C. Chuck and Victoria J. Tsoong for Defendant and Respondent.

Wilma and Raymond Pickett[1] sued their mortgage lender CIT Bank, N.A, erroneously sued as IndyMac Mortgage Services (IndyMac),[2] for negligence based on allegations IndyMac failed to ensure that repairs to the Picketts' house were properly done. The trial court granted IndyMac's motion for summary judgment on the ground IndyMac, as a mere lender, owed the Picketts no duty of care. We agree and affirm the judgment.

BACKGROUND

I. The deed of trust and the Picketts' home

In 2008, the Picketts obtained a residential mortgage from IndyMac in the amount of $520,000.[3] A deed of trust on the real property secured the mortgage note. In the event of damage to the property, the deed of trust provided that "any insurance proceeds . . . shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the

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[1] We refer to the Picketts by their first names for sake of clarity, intending no disrespect.

[2] We hereafter refer to respondent as IndyMac because that it is how it is often referred to in the record.

[3] CIT Bank N.A. was formerly known as OneWest Bank, F.S.B., which acquired all beneficial interest in the note and the deed of trust.

repairs and restoration in a single payment or in a series of progress payments as the work is completed."

In March 2013, a fire destroyed the Picketts' house. They made a claim to Farmers, their insurer. Farmers paid out the policy limits of $385,414.08 to IndyMac, which held the funds in an escrow account.

By a letter dated April 4, 2013, IndyMac described the procedures for monitored repairs to damaged property. In that letter, IndyMac stated that per the deed of trust and its security interest in the property, it was entitled to "oversee the repairs and disburse the insurance funds accordingly." IndyMac set forth "guidelines" for how the funds would disbursed. "In most instances," the funds would be disbursed "in 1/3 increments to cover the cost of the repairs as they are completed. We will order property inspections to be performed through the repair process, to ensure proper and complete reconstruction of the property." To receive the first installment, the Picketts had to forward documents to IndyMac, including a signed agreement with the contractor. To receive the second installment, the Picketts had to request an inspection. "When the results of this inspection show that at least 50 percent of the repairs have been completed," a second installment would be released. When repairs neared completion, IndyMac told the Picketts to return a certification of completion of repairs and to request a final inspection. If the final inspection showed that at least 90 percent of repairs had been completed, the balance would be released.

The Picketts hired Jonai Development to repair the property for $447,298.88, which was greater than the insurance proceeds. IndyMac issued the first disbursement of $128,471.36 in May 2013. After the Picketts' contractor asked for funds to

cover the unexpected cost of asbestos removal, IndyMac disbursed $64,235.68 on June 18, 2013.[4] After the contractor asked for additional funds to cover blueprints, IndyMac disbursed $64,235.68 on October 28, 2013.

On February 24, 2014, the Picketts' contractor asked IndyMac for a disbursement to cover the cost of unexpected foundation work. When IndyMac said a disbursement could not occur until an inspection showed that 90 percent of the repairs were completed, an inspection was scheduled for March 2014. The inspection showed that only five percent of repairs were completed. Nonetheless, the day after the inspection, the Picketts' contractor asked for a disbursement to cover the foundation repairs. After Farmers denied further coverage for the foundation and after the Picketts represented they would cover the difference between the insurance funds and the actual cost of repairs from their retirement funds, IndyMac disbursed $50,208 on April 17, 2014.[5] The Picketts signed each disbursement check. Another inspection in November 2014 showed repairs to be only seven percent complete.

Ultimately, the Picketts fired Jonai Development and reported its principal, Cindy Martin, to the police. Another contractor completed the repairs.

II. The lawsuit and summary judgment motion

The Picketts sued IndyMac for negligence based on the allegation IndyMac had a duty to act in a careful and prudent

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[4] Farmers paid an additional $35,850 above the policy limits for asbestos removal.

[5] It is unclear on this record when IndyMac disbursed the balance of the insurance proceeds.

manner to adhere to the disbursement plan and to inspect repairs before disbursing payments to the contractor.[6]

IndyMac moved for summary judgment or, alternatively, summary adjudication, on the grounds, among others, it owed no duty to the Picketts based on the express terms of the deed of trust.[7] Under that agreement, the lender retained the right, but not the obligation, to inspect the property before disbursing insurance proceeds. Even assuming IndyMac owed the Picketts a duty of care, it didn't breach the duty because the Picketts asked IndyMac for unscheduled disbursements to cover asbestos removal and to repair the foundation. To support the motion, IndyMac submitted numerous documents, including its claim notes documenting contact it had with the Picketts and their contractor, to show that Indymac's role was primarily limited to disbursing funds.

In opposing the motion, the Picketts asserted that the April 4, 2013 letter created a duty of care to oversee the repair process and to protect plaintiffs. They also argued that the claim notes established that IndyMac knew it was supposed to conduct inspections before disbursing funds but failed to do so.[8] Wilma also submitted a declaration stating that "IndyMac staff

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[6] The Picketts also sued Jonai Development and Cindy Martin for breach of contract and for fraud. They are not parties to this appeal.

[7] IndyMac also moved for summary adjudication on lack of causation and that the demand for emotional distress damages was barred. The trial court did not reach those issues, and because we resolve the matter on duty, neither do we.

[8] Because the claim notes had not been produced in discovery, the trial court allowed supplemental briefing.

repeatedly informed me that IndyMac will not approve any payment or disbursement unless it was satisfied that the payment was proper and appropriate. Based on these repeated assurances I received from IndyMac, I relied on IndyMac's expertise and knowledge and agreed to endorse the disbursement checks and turned them over to the contractor. I agreed to give the checks to the contractor because for each check issued, IndyMac staff told me that they reviewed the request and that it was appropriate to issue and release the check to the contractor."

The trial court found that IndyMac owed no duty of care and did not breach any duty because the undisputed evidence established that IndyMac did not actively participate in repairing the Picketts' home.[9] The trial court therefore granted summary judgment and Wilma[10] appealed.

DISCUSSION

I. Standard of review

A trial court properly grants summary judgment when "there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) The defendant moving for summary judgment bears the initial burden to show the action has no

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[9] Wilma contends that the trial court, in ruling on the summary judgment motion, was bound by its prior ruling on a motion to strike, which ruling found that the Picketts had sufficiently *alleged* a duty of care. However, the trial court's prior ruling, which concerned the sufficiency of the allegations, had no preclusive effect on its summary judgment ruling, which, in contrast, evaluated the evidence.

[10] Raymond is not a party to this appeal.

merit, that is, one or more elements of the cause of action cannot be established or there is a complete defense to the cause of action. (*Id.*, subds. (a)(1) & (p)(2).) " 'Once the defendant meets this initial burden of production, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. [Citation.] . . . [Citation.] We review the trial court's ruling on a summary judgment motion de novo, liberally construing the evidence in favor of the party opposing the motion and resolving all doubts about the evidence in favor of the opponent. [Citation.] We consider all of the evidence the parties offered in connection with the motion, except that which the court properly excluded.' " (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1085.)

II. Duty of care

The Picketts sued IndyMac for negligence only. The elements of negligence are duty of care, breach of duty, proximate cause, and damages. (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 614.) Whether the first element of duty of care exists is a question of law. (*Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1240.) In the context before us involving a lender and borrower, a lender generally "owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a . . . money lender." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096; see *Meyers v. Guarantee Sav. & Loan Assn.* (1978) 79 Cal.App.3d 307, 312 (*Meyers*).) However, a financial institution may owe fiduciary duties to a borrower if the institution's financing activity extends beyond that of a conventional lender. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979–981.) Thus, a lender that actively

participates in a construction enterprise may become "much more than a lender content to lend money at interest on the security of real property." (*Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 864 (*Connor*).) Still, a lender's "[n]ormal supervision" of an enterprise "for the protection of its security interest in loan collateral is not 'active participation' " sufficient to create a duty of care. (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 35.)

In *Meyers*, *supra*, 79 Cal.App.3d at page 309, for example, the Meyers borrowed money from a bank to build a house. The loan agreement provided that the loan proceeds would be deposited into an account maintained by the bank and would be disbursed to the contractor when the contractor verified certain work had been done. The bank was entitled to inspect the property to see if work was progressing satisfactorily, but the agreement also provided that the bank was not assuming the duties of a contractor or architect and was not required to make inspections. (*Ibid.*) During construction, the bank made seven general property inspections. Unhappy with the contractor's deviation from building specifications, the Meyers sued the bank on the theory it owed them a duty of care to inspect the construction project regularly to ensure the contractor complied with specifications. (*Id.* at p. 310.) Based primarily on the express terms of the loan agreement stating the bank had no duty to make inspections and that any inspections were for its and not the Meyers' benefit, *Meyers* found that the bank owed no duty of care. No duty arose because the bank did not engage in "any activity outside the scope of the normal activities of a lender of construction monies." (*Id.* at p. 312.)

Wilma distinguishes *Meyers* on the ground her deed of trust does not expressly disclaim a duty to inspect. That is true. What is also true is that nothing in the deed of trust states IndyMac will or is obligated to inspect the property or otherwise to manage and to oversee the project. Instead, the deed of trust merely gives IndyMac the *opportunity* to inspect and to disburse the funds accordingly. This right to inspect reflects nothing more than a lender's general interest in protecting its security.[11]

Wilma next relies on IndyMac's April 4, 2013 letter to create a triable issue of material fact regarding duty. The letter states that, to the end of protecting the lender's security, disbursement of the second and final installments could be contingent on the work progressing in a specified manner. The letter therefore does suggest IndyMac will inspect the property and disburse the second and third payments if the repairs meet specified benchmarks. However, the suggestion IndyMac would inspect the property before issuing payments, by itself, is insufficient to impose an independent obligation on IndyMac to ensure the Picketts' home was being properly repaired. Rather, for the traditional lender-borrower relationship to be transformed into a fiduciary one, much more than a letter indicating the lender would conduct inspections is required. (See generally *Connor*, *supra*, 69 Cal.2d 850.)

In *Connor*, *supra*, 69 Cal.2d at page 858, the lender, Great Western, loaned money to developers to buy 100-acres of land on which single-family homes would be built. Although Great Western was the lender, it held title to the land under an

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[11] Even if the deed of trust somehow obligated IndyMac to manage and to oversee the repairs process, it is unclear why any cause of action would sound in tort as opposed to contract.

arrangement known as " 'land warehousing,' " where a financial institution holds land for a developer until the developer is ready to use it. (*Id.* at p. 859.) Great Western became intimately involved with the development. The developers granted Great Western the right to make construction loans on the homes and various rights of first refusal regarding other loans. (*Id*. at p. 858.) Great Western hired a geologist to examine the adequacy of the water supply and demanded a guarantee that adequate water service lines would be available. It required submission of plans of model homes with cost breakdowns, proposed subcontractors and what they would do, and a schedule of proposed prices. And Great Western became "preoccupied" with selling prices and home sales. (*Id.* at p. 860.)

After the homes were developed and sold, homeowners sued because the foundations had been poorly designed. (*Connor*, *supra*, 69 Cal.2d at p. 856.) The trial court found that Great Western was liable for its negligence: "Great Western voluntarily undertook business relationships . . . to develop the Weathersfield tract and to develop a market for the tract houses in which prospective buyers would be directed to Great Western for their financing. In undertaking these relationships, Great Western became much more than a lender content to lend money at interest on the security of real property. It became an active participant in a home construction enterprise. It had the right to exercise extensive control of the enterprise. Its financing, which made the enterprise possible, took on ramifications beyond the domain of the usual money lender. It received not only interest on its construction loans, but also substantial fees for making them, a 20 percent capital gain for 'warehousing' the land, and

protection from loss of profits in the event individual home buyers sought permanent financing elsewhere." (*Id.* at p. 864.)

In contrast to *Connor*, the evidence here is insufficient to raise a triable issue that IndyMac became so intimately involved in the repair process to the Picketts' house that it assumed the role of "project manager, coordinator[,] and overseer" of the project, as Wilma contends. Instead, the undisputed evidence is the Picketts selected and hired the contractor. Wilma signed documents the contractor gave her regarding the repairs without investigating what they were for or to whom they were being sent. The claim notes also show that IndyMac's involvement in the repair process was a limited one. That is, IndyMac's contact with the Picketts and their contractor was telephonic and primarily concerned obtaining necessary documents, when draws would be released, and whether the Picketts' insurer would pay additional monies to cover unforeseen costs. IndyMac did periodically inspect the property, with a March 4, 2014 inspection showing repairs to be five percent completed, and a November 3, 2014 inspection showing them to be seven percent completed. Thus, other than issuing funds and conducting periodic inspections, the notes confirm that IndyMac had no involvement in directing, overseeing and managing the repairs of the Picketts' home. Such activity does not constitute active participation. Rather, mere "[a]pproval of plans and specifications, and periodic inspection of houses during the construction is normal procedure for any construction money lender." (*Bradler v. Craig* (1969) 274 Cal.App.2d 466, 475.)

Finally, the Picketts acknowledged in discovery responses that their evidence supporting negligence is limited to IndyMac's disbursement of insurance proceeds without conducting

inspections: "IndyMac . . . issued disbursement checks without inspecting the damaged premises, and indicat[ed] to the Picketts that the contractor was entitled to the checks issue[d] to IndyMac. Further, IndyMac failed to conduct [a] reasonable investigation or inquiry to determine if the contractor was licensed." That IndyMac issued draws that did not comply with the guidelines in its April 2013 letter—that is, without a prior inspection and when only zero percent, five percent or seven percent of repairs had been accomplished—are facts relevant to breach. But, we have found no duty, and in the absence of duty, there can be no breach.

DISPOSITION

The judgment is affirmed. IndyMac Mortgage Services is awarded its costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.